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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,303	03/09/2004	Gary Weller	514362001410	4452
7590	03/30/2010			
John S. Nagy (Fulwider, Patton , Lee & Utecht, LLP) Howard Hughes Center 6060 Center Drive, Tenth Floor Los Angeles, CA 90045				EXAMINER YABUT, DIANE D
		ART UNIT 3734		PAPER NUMBER
			MAIL DATE 03/30/2010	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/797,303	WELLER ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	DIANE YABUT	3734	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 23 September 2009.

2a) This action is **FINAL**.                            2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 29-36 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 29-36 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____ .
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)	5) <input type="checkbox"/> Notice of Informal Patent Application
Paper No(s)/Mail Date _____ .	6) <input type="checkbox"/> Other: _____ .

## DETAILED ACTION

This action is in response to applicant's pre-brief conference request received on 09/23/2009. Upon further consideration, a new grounds of rejection is made below.

### ***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over **Adams et al.** (U.S. Pub. No. **2003/0132267**).

Adams et al. disclose a cartridge assembly having a longitudinal axis (see embodiment of Figures 22-25), the cartridge assembly having a first tissue acquisition member ("stapler member") **17** pivotable about the longitudinal axis or a longitudinal hinge **60** in relation to a second tissue acquisition member ("anvil member") **10** between open and closed configurations; each tissue acquisition member including a tissue receiving cavity (between the hinge and **17d** and between the hinge and **10d**, wherein acquisition is met by holding tissue) sized to receive a fold of stomach tissue, the tissue receiving cavity being coupled to a vacuum port; and a stapler disposed on the first tissue acquisition member and the second tissue acquisition member for stapling the fold of stomach tissue (paragraph 112).

Adams et al. teach utilizing suction in another embodiment (paragraph 100), but does not expressly disclose each tissue receiving cavity being coupled to a vacuum port. However, it would have been obvious to one of ordinary skill in the art to provide a vacuum port that is coupled to each receiving cavity in the embodiment of Figures 22-25 in order to prevent debris from accumulating between the two acquisition members (paragraph 100) and since there are many other variations of the embodiments within the teaching of the present invention that those skilled in the art will understand (paragraph 135).

3. Claims 30-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over **Adams et al.** (U.S. Pub. No. **2003/0132267**) in view of **Deem et al.** (U.S. Patent No. **6,558,400**).

Adams et al. disclose the claimed device except for a bioabsorbable septum removably positioned between the first tissue acquisition member and the second acquisition member which projects radially outward from the longitudinal hinge, or an expandable element

Deem et al. teach a removable septum **196** projecting radially outward from between two first and second members (Figure 10, col. 11, line 57 to col. 12, line 3). It would have been obvious to one of ordinary skill in the art at the time of invention to provide a septum, as taught by Deem et al., to the device of Adams et al. in order to damage contacting tissue to speed healing time (col. 11, lines 41-46).

Deem et al. also teach an expandable member or balloon **52** (Figure 2). It would have been obvious to one of ordinary skill in the art at the time of invention to provide an expandable member, as taught by Deem et al., to the device of Adams in order to stabilize the device during a procedure (col. 8, lines 26-27).

Although neither Adams et al. nor Deem et al. teach a septum that is made of bioabsorbable material selected from the group consisting of polylactic acid (PLA), poly(lactic-co-glycolic acid) (PLGA), and polyglycolic acid (PGA), it would have been obvious to one of ordinary skill in the art at the time of invention to provide a bioabsorbable material since it is a biocompatible material and since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use.

### ***Response to Arguments***

4. Applicant's arguments with respect to claims 29-36 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DIANE YABUT whose telephone number is (571)272-6831. The examiner can normally be reached on M-F: 9AM-4PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Todd Manahan can be reached on (571) 272-4713. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Diane Yabut/  
Examiner, Art Unit 3734

/Todd E Manahan/  
Supervisory Patent Examiner, Art Unit 3734